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ARTICLES

# The Ethics of Deceptive Interrogation

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## I Introduction

As David Rothman and Aryeh Neier have recently reported, "third degree" police practices—torture and severe beatings—remain commonplace in India, the world's largest democracy.[1] Police brutality during interrogation flourishes because it is widely accepted by the middle classes.[2] Although this may seem uncivilized to most Americans, it was not so long ago that American police routinely used physical violence to extract admissions from criminal suspects.[3] Since the 1960s, and especially since *Miranda*, police brutality during interrogation has virtually disappeared in America. Although one occasionally reads about or hears reports of physical violence during custodial questioning,[4] police observers and critics agree that the use of physical coercion during interrogation is now exceptional.

This transformation occurred partly in response to the influential Wickersham report,[5] which disclosed widespread police brutality in the United States during the 1920s; partly in response to a thoughtful and well-intentioned police professionalism, as exemplified by Fred Inbau and his associates; and partly in response to changes in the law which forbade police to "coerce" confessions but allowed them to elicit admissions by deceiving suspects who have waived their right to remain silent. Thus, over the last fifty to sixty years, the methods, strategies, and consciousness of American police interrogators have been transformed: psychological persuasion and manipulation have replaced physical coercion as the most salient and defining features of contemporary police interrogation. Contemporary police interrogation is routinely deceptive.[6] As it is taught and practiced today, interrogation is shot through with deception. Police are instructed to, are authorized to—and do—trick, lie, and cajole to elicit so-called "voluntary" confessions.

Police deception, however, is more subtle, complex, and morally puzzling than physical coercion. Although we share a common moral sense in the West that police torture of criminal suspects is so offensive as to be impermissible—a sentiment recently reaffirmed by the violent images of the Rodney King beating—the propriety of deception by police is not nearly so clear. The law reflects this ambiguity by being inconsistent, even confusing. Police are permitted to pose as drug dealers, but not to use deceptive tactics to gain entry without a search warrant; nor are they permitted to falsify an affidavit to obtain a search warrant.

The acceptability of deception seems to vary inversely with the level of the criminal process. Cops are permitted to, and do, lie routinely during investigation of crime, especially when, working as "undercovers," they pretend to have a different identity.[7] Sometimes they may, and sometimes may not, lie when conducting custodial interrogations. Investigative and interrogatory lying are each justified on utilitarian crime control grounds. But police are never supposed to lie as witnesses in the courtroom, although they may lie for utilitarian reasons similar to those permitting deception at earlier stages.[8] In this article, we focus on the interrogatory stage of police investigation, considering (1) how and why the rather muddled legal

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theory authorizing deceptive interrogation developed; (2) what deceptive interrogation practices police, in fact, engage in; and—a far more difficult question—(3) whether police should ever employ trickery and deception during interrogation in a democratic society valuing fairness in its judicial processes.

## II The Jurisprudence of Police Interrogation

The law of confessions is regulated by the Fifth, Sixth, and Fourteenth Amendments. Historically, the courts have been concerned almost exclusively with the use of *coercion* during interrogation. Although a coerced confession has been inadmissible in federal cases since the late nineteenth century, the Supreme Court did not proscribe physically coercive practices in state cases until 1936.[9] In *Brown v. Mississippi*, three black defendants were repeatedly whipped and pummelled until they confessed. This was the first in a series of state cases in which the Court held that confessions could not be "coerced," but had to be "voluntary" to be admitted into evidence.[10]

Whether a confession meets that elusive standard is to be judged by "the totality of the circumstances." Under that loose and subjective guideline, an admission is held up against "all the facts" to decide whether it was the product of a "free and rational will" or whether the suspect's will was "overborne" by police pressure. Over the years, however, certain police practices have been designated as presumptively coercive. These include physical force, threats of harm or punishment, lengthy or incommunicado interrogation, denial of food and/or sleep, and promises of leniency.[11] In 1940, the Supreme Court ruled—in a case in which a suspect was first threatened with mob violence, then continuously questioned by at least four officers for five consecutive days—that psychological pressure could also be coercive.[12]

*An interrogation is presumed to be coercive unless a waiver is obtained.*

One reason for excluding admissions obtained through coercion is their possible falsity. But, beginning with *Lisenba v. California*[13] in 1941, and followed by *Ashcraft v. Tennessee*[14] three years later, the Supreme Court introduced the criterion of *fairness* into the law. Whether in the context of searches or interrogations, evidence gathered by police methods that "shock the conscience" of the community or violate a fundamental standard of fairness are to be excluded, regardless of reliability.[15] This rationale is sometimes twinned with a third purpose: deterring offensive or unlawful police conduct.

In its watershed *Miranda* decision, the Supreme Court in 1966 prescribed specific limitations on custodial interrogation by police.[16] The five-to-four majority deplored a catalog of manipulative and potentially coercive psychological tactics employed by police to elicit confessions from unrepresented defendants. In essence, the court could not reconcile ideas such as "fairness" and "voluntariness" with the increasingly sophisticated and psychologically overbearing methods of interrogation. In response, it fashioned the now familiar prophylactic rules to safeguard a criminal defendant's fifth amendment right against testimonial compulsion. As part of its holding, *Miranda* requires that (1) police advise a suspect of her right to remain silent and her right to an attorney, and (2) the suspect "voluntarily, knowingly and intelligently" have waived these rights before custodial interrogation can legally commence. An interrogation is presumed to be coercive unless a waiver is obtained. Once obtained, however, the "due process-voluntariness" standard governs the admissibility of any confession evidence. In practice, once a waiver is obtained, most of the deceptive tactics deplored by the majority become available to the police.

In retrospect, *Miranda* seems to be an awkward compromise between those who argue that a waiver cannot be made "intelligently" without the advice of an attorney, who would usually advise her client to remain silent, and those who would have preferred to retain an unmodified voluntariness standard because police questioning is "a particularly trustworthy instrument for screening out the innocent and fastening on the guilty," and because the government's obligation is "not to counsel the accused but to question him."[17]

In sum, then, three sometimes competing principles underlie the law of confessions: first, the truth-finding rationale, which serves the goal of *reliability* (convicting an

innocent person is worse than letting a guilty one go free); second, the substantive due process or *fairness* rationale, which promotes the goal of the system's integrity; and third, the related *deterrence* principle, which proscribes offensive or lawless police conduct.

The case law of criminal procedure has rarely, however, and often only indirectly, addressed the troubling issue of trickery and deceit during interrogation. We believe this is the key issue in discussing interrogation since, we have found, interrogation usually implies deceiving and cajoling the suspect.

Police deception that intrudes upon substantive constitutional rights is disallowed. For example, the Supreme Court has ruled that an officer cannot trick a suspect into waiving his *Miranda* rights. But apart from these constraints, the use of trickery and deception during interrogation is regulated solely by the due process clause of the Fourteenth Amendment, and is proscribed, on a case-by-case basis, only when it violates a fundamental conception of fairness or is the product of egregious police misconduct. The courts have offered police few substantive guidelines regarding the techniques of deception during interrogation. Nor have the courts successfully addressed the relation between fairness and the lying of police, or the impact of police lying on the broader purposes of the criminal justice system, such as convicting and punishing the guilty. As we shall see, the relations among lying, conceptions of fairness, and the goals of the criminal justice system raise intriguing problems.



## III A Typology of Interrogatory Deception

Because police questioning remains shrouded in secrecy, we know little about what actually happens during interrogation. Police rarely record or transcribe interrogation sessions.[18] Moreover, only two observational studies of police interrogation have been reported, and both are more than two decades old.[19] Most articles infer from police training manuals what must transpire during custodial questioning. Our analysis is based on Richard Leo's dissertation research. It consists of a reading of the leading police training manuals from 1942 to the present; from attending local and national interrogation training seminars and courses; from listening to tape-recorded interrogations; from studying interrogation transcripts; and from ongoing interviews with police officials.

### A *Interview" versus "Interrogate"*

The Court in *Miranda* ruled that warnings must be given to a suspect who is in custody, or whose freedom has otherwise been significantly deprived. However, police will question suspects in a "non-custodial" setting—which is defined more by the suspect's state of mind than by the location of the questioning—so as to circumvent the necessity of rendering warnings. This is the most fundamental, and perhaps the most overlooked, deceptive stratagem police employ. By telling the suspect that he is free to leave at any time, and by having him acknowledge that he is voluntarily answering their questions, police will transform what would otherwise be considered an interrogation into a non-custodial interview. Thus, somewhat paradoxically, courts have ruled that police questioning outside of the station may be custodial,[20] just as police questioning inside the station may be non-custodial.[21] The line between the two is the "objective" restriction on the suspect's freedom. Recasting the interrogation as an interview is the cleanest deceptive police tactic since it virtually removes police questioning from the realm of judicial control.

### B *Miranda Warnings*

When questioning qualifies as "custodial," however, police must recite the familiar warnings. The Court declared in *Miranda* that police cannot trick or deceive a suspect into waiving *Miranda* rights.[22] The California Supreme Court has additionally ruled that police cannot "soften up" a suspect prior to administering the warnings.[23] However, police routinely deliver the *Miranda* warnings in a flat, perfunctory tone of voice to communicate that the warnings are merely a bureaucratic ritual. Although it might be inevitable that police would deliver *Miranda* warnings unenthusiastically, investigators whom we have interviewed say that they *consciously* recite the warnings in a manner intended to heighten the likelihood of eliciting a waiver. It is thus not surprising that police are so generally successful in obtaining waivers.[24]

### C *Misrepresenting the Nature or Seriousness of the Offense*

Once the suspect waives, police may misrepresent the nature or seriousness of the offense. They may, for ex-

ample, tell a suspect that the murder victim is still alive, hoping that this will compel the suspect to talk. Or police may exaggerate the seriousness of the offense—overstating, for example, the amount of money embezzled—so that the suspect feels compelled to confess to a smaller role in the offense. Or the police may suggest that they are only interested in obtaining admissions to one crime, when in fact they are really investigating another crime. For example, in a recent case, *Colorado v. Spring*, federal agents interrogated a suspect on firearms charges and parlayed his confession into an additional, seemingly unrelated and unimportant, admission of first-degree murder.[25] Despite their pretense to the contrary, the federal agents were actually investigating the murder, not the firearms charge. This tactic was upheld by the Supreme Court.

D *Role Playing: Manipulative Appeals to Conscience*

Effective interrogation often requires that the questioner feign different personality traits or act out a variety of roles.[26] The interrogator routinely projects sympathy, understanding, and compassion in order to play the role of the suspect's friend. The interrogator may also try to play the role of a brother or father figure, or even to act as a therapeutic or religious counselor to encourage the confession. The best-known role interrogators may act out is, of course, the good cop/bad cop routine, often played out by a single officer. While acting out these roles, the investigator importunes—sometimes relentlessly—the suspect to confess for the good of her case, her family, society, or conscience. These tactics generate an illusion of intimacy between the suspect and the officer while downplaying the adversarial aspects of interrogation.

The courts have routinely upheld the legitimacy of such techniques—which are among the police's most effective in inducing admissions—except when such role-playing or manipulative appeals to conscience can be construed as "coercive," as when, for example, an officer implies that God will punish the suspect for not confessing.[27]

E *Misrepresenting the Moral Seriousness of the Offense*

Misrepresentation of the moral seriousness of an offense is at the heart of interrogation methods propounded by Inbau, Reid, and Buckley's influential police training manual.[28] Interrogating officials offer suspects excuses or moral justifications for their misconduct by providing the suspect with an external attribution of blame that will allow him to save face while confessing. Police may, for example, attempt to convince an alleged rapist that he was only trying to show the victim love or that she was really "asking for it"; or they may persuade an alleged embezzler that blame for her actions is attributable to low pay or poor working conditions. In *People v. Adams*, for example, the officer elicited the initial admission by convincing the suspect that it was the gun, not the suspect, that had done the actual shooting.[29] Widely upheld by the courts, this tactic is advertised by police training manuals and firms as one of their most effective.

F *The Use of Promises*

The systematic persuasion—the wheedling, cajoling, coaxing, and importuning—employed to induce conversation and elicit admissions often involves, if only implicitly or indirectly, the use of promises. Although promises of leniency have been presumed to be coercive since 1897, courts continue to permit vague and indefinite promises.[30] The admissibility of a promise thus seems to turn on its specificity. For example, in *Miller v. Fenton*, the suspect was repeatedly told that he had mental problems and thus needed psychological treatment rather than punishment. Although this approach implicitly suggested a promise of leniency, the court upheld the validity of the resulting confession.[31]

Courts have also permitted officers to tell a suspect that his conscience will be relieved only if he confesses, or that they will inform the court of the suspect's cooperation, or that "a showing of remorse" will be a mitigating factor, or that they will help the suspect out in every way they can if he confesses.[32] Such promises are deceptive insofar as they create expectations that will not be met. Since interrogating officials are single-mindedly interested in obtaining admissions and confessions, they rarely feel obliged to uphold any of their promises.

G *Misrepresentations of Identity*

A police agent may try to conceal his identity, pretending to be someone else, while interrogating a suspect. In *Leyra v. Denno*, the suspect was provided with a physician for painful sinus attacks he begun to experience after several days of unsuccessful interrogation.[33] But the physician was really a police psychiatrist, who repeatedly assured the defendant that he had done no wrong and would be let off easily. The suspect subsequently confessed, but the Supreme Court ruled here that the confession was inadmissible. It would be equally impermissible for a police official or agent to pretend to be a suspect's lawyer or priest. However, in a very recent case, *Illinois v. Perkins*, a prison inmate, Perkins, admitted a murder to an undercover police officer who, posing as a returned escapee, had been placed in his cellblock.[34] The Rehnquist Court upheld the admissibility of the confession. Since Perkins was in jail for

an offense unrelated to the murder to which he confessed, the Rehnquist Court said, Perkins was not, for *Miranda* purposes, "in custody." Nor, for the same reason, were his Sixth Amendment *Massiah* rights violated.[35] Thus, the profession or social group with which an undercover officer or agent identifies during the actual questioning may—as a result of professional disclosure rules or cultural norms—be more significant to the resulting legal judgment than the deceptive act itself.[36]

H *Fabricated Evidence*

Police may confront the suspect with false evidence of his guilt. This may involve one or more of five gambits. One is to falsely inform the suspect that an accomplice has identified him. Another is to falsely state that existing physical evidence—such as fingerprints, bloodstains, or hair samples—confirm his guilt. Yet another is to assert that an eyewitness or the actual victim has identified and implicated him. Perhaps the most dramatic physical evidence ploy is to stage a line-up, in which a coached witness falsely identifies the suspect. Finally, one of the most common physical evidence ploys is to have the suspect take a lie-detector test and regardless of the results—which are scientifically unreliable and invalid in any event—inform the suspect that the polygraph confirms his guilt.[37] In the leading case on the use of police trickery, *Frazier v. Cupp*, the Supreme Court upheld the validity of falsely telling a suspect that his crime partner had confessed.[38]



## IV The Consequences of Deception

Although lying is, as a general matter, considered immoral, virtually no one is prepared to forbid it categorically. The traditional case put to the absolutist is that of the murderer chasing a fleeing innocent victim, whose whereabouts are known by a third party. Should the third party sacrifice the innocent victim to the murderer for the cause of truth? Few of us would say that she should. We thus assume a utilitarian standard regarding deception. So, too, with respect to police interrogation.

Interrogatory deception is an exceedingly difficult issue, about which we share little collective feeling. How are we to balance our respect for truth and fairness with our powerful concern for public safety and the imposition of just deserts? We are always guided by underlying intuitions about the kind of community we want to foster and in which we want to live. Which is worse in the long run—the excesses of criminals or the excesses of authorities?

Few of us would countenance torture by police in the interests of those same values. One reason is that violence may produce false confessions. As Justice Jackson observed in his dissent in *Ashcraft*: "...[N]o officer of the law will resort to cruelty if truth is what he is seeking."[39] But that is only partly correct. Cruelty can also yield incontrovertible physical evidence. We reject torture for another reason—we find it uncivilized, conscience-shocking, unfair, so most of us are repelled by it. That leads to a third reason for opposing torture. If effective law enforcement requires public trust and cooperation, as the recent movement toward community-oriented policing suggests, police who torture can scarcely be expected to engender such confidence.

What about police deception? Does it lead to false confessions? Is it unfair? Does it undermine public confidence in the police? A recent and fascinating capital case in the Florida Court of Appeal, *Florida v. Cayward*, the facts of which are undisputed, is relevant to the above questions.[40] The defendant, a nineteen-year-old male, was suspected of sexually assaulting and smothering his five-year-old niece. Although he was suspected of the crime, the police felt they had too little evidence to charge him. So they interviewed him, eventually advised him of his rights, and obtained a written waiver.

Cayward maintained his innocence for about two hours. Then the police showed him two false reports, which they had fabricated with the knowledge of the state's attorney. Purportedly scientific, one report used Florida Department of Criminal Law Enforcement stationery; another used the stationery of Life Codes, Inc., a testing organization. The false reports established that his semen was found on the victim's underwear. Soon after, Cayward confessed.

Should this deception be considered as akin to lying to a murderer about the whereabouts of the victim? Or should police trickery, and especially the falsification of documents, be considered differently? We unsys-

tematically put this hypothetical question to friends in Berkeley and asked about it in a discussion with scholars-in-residence at the Rockefeller Study Center in Bellagio, Italy. The answers, we discovered, revealed *no* common moral intuition. For some, the answer was clear—in either direction. "Of course the police should lie to catch the murdering rapist of a child," said one. "I don't want to live in a society where police are allowed to lie and to falsify evidence," said another. Most were ambivalent, and all were eager to know how the Florida court resolved the dilemma.

Citing *Frazier v. Cupp* and other cases, the court recognized "that police deception does not render a confession involuntary *per se*." Yet the court, deeply troubled by the police deception, distinguished between "verbal assertions and manufactured evidence." A "bright line" was drawn between the two on the following assumption: "It may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him."[41]

Although we do not know the accuracy of the conjecture, it assumes that false police assertions such as "Your fingerprints were found on the cash register" are rarely believed by suspects unless backed up by a false fingerprint report. But in these deception cases, we do not usually encounter prudent suspects who are skeptical of the police. Such suspects rarely, if ever, waive their constitutional rights to silence or to an attorney. As in *Cayward*, and many deception cases, the suspect, young or old, white or black, has naively waived his right to remain silent and to an attorney.

*The decision in* Cayward *is bedeviled by the classic problem of determining whether Cayward's confession was "voluntary."*

Would such a suspect disbelieve, for example, the following scenario? After two hours of questioning, the telephone rings. The detective answers, nods, looks serious, turns to the suspect and says: "We have just been informed by an independent laboratory that traces of your semen were found, by DNA tests, on the panties of the victim. What do you say to that?"

A verbal lie can be more or less convincing, depending upon the authority of the speaker, the manner of speaking, its contextual verisimilitude, and the gullibility of the listener. False documentation adds to verisimilitude, but a well-staged, carefully presented verbal lie can also convince. The decision in *Cayward*, however well-written and considered, is nevertheless bedeviled by the classic problem of determining whether Cayward's confession was "voluntary."

No *contested* confession, however, is ever voluntary in the sense of purging one's soul of guilt, as one would to a religious figure. "The principal value of confession may lie elsewhere, in its implicit reaffirmation of the moral order," writes Gerald M. Caplan. "The offender by his confession acknowledges that he is to blame, not the community."[42] That observation focuses on the offender. Sometimes that is true, oftentimes it is not. Those who contest their confessions claim that they were unfairly pressured, and point to the tactics of the police. The claim is that the police violated the moral order by the use of unfair, shady, and thus wrongful tactics to elicit the confession. Had the police, for example, beaten a true confession out of Cayward, it would indeed seem perverse to regard his confession as a reaffirmation of the moral order.

If Cayward had been beaten, and had confessed, we would also be concerned that his confession was false. Assuming that all we know are the facts stated in the opinion, which say nothing of corroborating evidence or why Cayward was suspected, should we assume that his confession was necessarily true? However infrequent they may be, false confessions do occur. Moreover, they do not result *only* from physical abuse, threats of harm, or promises of leniency, as Fred Inbau and his associates have long maintained;[43] nor are they simply the result of police pressures that a fictionalized reasonable person would find "overbearing," as Joseph Grano's "mental freedom" test implies.[44] They may arise out of the manipulative tactics of influence and persuasion commonly taught in police seminars and practiced by police and used on Cayward.

Psychologists and others have recently begun to classify and analyze the logic and process of these false confessions,[45] which are among the leading causes of wrongful conviction.[46] Perhaps most interesting is the "coerced-internalized" false confession, which is elicited when the psychological pressures of interrogation cause an innocent person to temporarily internalize the message(s) of his or her interrogators and falsely believe himself to be guilty.[47] Although Cayward was probably factually guilty, he might have been innocent. Someone who is not altogether mature and mentally stable, as would almost certainly be true of a nineteen-year-old accused of smothering and raping his

five-year-old niece, might also have a precarious and vague memory. When faced with fabricated, but supposedly incontrovertible, physical evidence of his guilt, he might falsely confess to a crime of which he has no recollection, as happened in the famous case of Peter Reilly,[48] and, more recently, in the Florida case of Tom Sawyer,[49] both of which were "coerced-internalized" false confessions.[50]

*Rarely do advocates of greater latitude for police to interrogate consider the effects of systematic lying on law enforcement's reputation for veracity.*

If Cayward was, in fact, guilty, as his confession suggests, the court was nevertheless willing to exclude it. Presumably, he will remain unpunished unless additional evidence can be produced. Characterizing the falsified evidence as an offense to "our traditional notions of due process of law," the Florida court was evidently alarmed by the *unfairness* of a system which allows police to "knowingly fabricate tangible documentation or physical evidence against an individual."[51] In addition to its "spontaneous distaste" for the conduct of the police, the court added a longer-range utilitarian consideration. Documents manufactured for such purposes, the court fears, may, because of their "potential of indefinite life and the facial appearance of authenticity,"[52] contaminate the entire criminal justice system. "A report falsified for interrogation purposes might well be retained and filed in police paperwork. Such reports have the potential of finding their way into the courtroom."[53] The court also worried that if false reports were allowed in evidence, police might be tempted to falsify all sorts of official documents "including warrants, orders and judgements," thereby undermining public respect for the authority and integrity of the judicial system.

Yet the slippery slope argument applies to lying as well as to falsification of documents. When police are permitted to lie in the interrogation context, why should they refrain from lying to judges when applying for warrants, from violating internal police organization rules against lying, or from lying in the courtroom? For example, an Oakland Tribune columnist, Alix Christie, recently received a letter from a science professor at the University of California at Berkeley who had served on an Alameda County (Oakland) murder jury. He was dismayed that a defendant, whom he believed to be guilty, had been acquitted because most of the jurors did not believe the police, even about how long it takes to drive from west to east Oakland. "The problem," writes Christie, "predates Rodney King. It's one familiar to prosecutors fishing for jurors who don't fit the profile of people who distrust cops." She locates the problem in "the ugly fact that there are two Americas." In the first America, the one she was raised in, the police are the "good guys." In the other, police are viewed skeptically.

Police misconduct—and lying is ordinarily considered a form of misconduct—undermines public confidence and social cooperation, especially in the second America. People living in these areas often have had negative experiences with police, ranging from an aloof and legalistic policing "style" to corruption, and even to the sort of overt brutality that was captured on the videotape of the Rodney King beating in Los Angeles. Community-oriented policing is being implemented in a number of American police departments to improve trust and citizen cooperation by changing the attitudes of both police and public.

Police deception may thus engender a paradoxical outcome. Although affirmed in the interest of crime control values by its advocates like Fred Inbau—who, along with his co-author John Reid, has exerted a major influence on generations of police interrogators—it may generate quite unanticipated consequences. Rarely do advocates of greater latitude for police to interrogate consider the effects of systematic lying on law enforcement's reputation for veracity. Police lying might not have mattered so much to police work in other times and places in American history. But today, when urban juries are increasingly composed of jurors disposed to be distrustful of police, deception by police during interrogation offers yet another reason for disbelieving law enforcement witnesses when they take the stand, thus reducing police effectiveness as controllers of crime.

Conservatives who lean toward crime control values do not countenance lying as a general matter. They approve of police deception as a necessity, measuring the cost of police deceit against the benefits of trickery for victims of crime and the safety of the general public. Police and prosecutors affirm deceitful interrogative practices not because they think these are admirable, but because they believe such tactics are necessary.[54]

The Florida police officers who fabricated evidence did so for the best of reasons. The victim was a five-year-old girl, and the crime was abhorrent and hard to prove.

Nevertheless, the Florida court excluded the confession on due process grounds, arguing that police must be discouraged from fabricating false official documents. Many persons, but especially those who, like Fred Inbau, affirm the propriety of lying in the interrogatory context, tend to undervalue the significance of the long-term harms caused by such authorized deception: namely, that it tends to encourage further deceit, undermining the general norm against lying. And if it is true that the fabrication of documents "greatly lessens," as the Florida court says, "the respect the public has for the criminal justice system and for those sworn to uphold and enforce the law,"[55] doesn't that concern also apply to interrogatory lying?

There is an additional reason for opposing deceitful interrogation practices. It does happen that innocent people are convicted of crimes. Not as often, probably, as guilty people are set free, but it does happen. Should false evidence be presented, a suspect may confess in the belief that he will receive a lesser sentence. In a study in 1986 of wrongful conviction in felony cases, Ronald Huff and his colleagues conservatively estimated that nearly 6,000 false convictions occur every year in the United States.[56] Hugo Bedau and Michael Radelet, who subsequently studied 350 known miscarriages of justice in recent American history, identified false confessions as one of the leading sources of erroneous conviction of innocent individuals.[57]

*Those who affirm the propriety of lying in the interrogatory context, tend to undervalue the significance of the long-term harms caused by such authorized deception.*

There are no easy answers to these dilemmas, no easy lines to suggest when the need to keep police moral and honest brushes up against the imperatives of controlling crime. Phillip E. Johnson, who has proposed a thoughtful statutory replacement for the Miranda doctrine,[58] would not allow police to "intentionally misrepresent the amount of evidence against the suspect, or the nature and seriousness of the charges,"[59] as well as other, clearly more coercive tactics. But he would allow feigned sympathy or compassion, an appeal to conscience or values, and a statement to the suspect such as "A voluntary admission of guilt and sincere repentance may be given favorable consideration at the time of sentence."[60] Johnson states no formal *principle* for these distinctions, but does draw an intuitively sensible contrast between, on the one hand, outright *misrepresentations*, which might generalize to other venues and situations; and, on the other, *appeals* to self-interest or conscience, which seem to draw upon commonly held and morally acceptable values. If, however, as we have argued, rules for police conduct, and the values imparted through these rules, produce indirect, as well as direct, consequences for police practices and the culture of policing, Johnson's distinctions are persuasive. This resolution, we suggest, is quite different from the direction recently taken by the Rehnquist Court.

We have earlier argued that when courts allow police to deceive suspects for the good end of capturing criminals—even as, for example, in "sting" operations —they may be tempted to be untruthful when offering testimony. However we think we ought to resolve the problem of the ethics of deceptive interrogation, we need always to consider the unanticipated consequences of permitting police to engage in what would commonly be considered immoral conduct—such as falsifying evidence. The Supreme Court has moved in recent years to soften the control of police conduct in interrogation. In *Moran v. Burbine*, for example, the Court let stand a murder conviction even though the police had denied a lawyer—who had been requested by a third party, but without the suspect's knowledge, prior to his questioning—to the suspect during interrogation. The dissenters decried the "incommunicado questioning" and denounced the majority for having embraced "deception of the shabbiest kind."[61]

More recently, the notoriety of the Rodney King beating overshadowed the significance of the Rehnquist Court's most significant self-incrimination decision, *Arizona v. Fulminante*.[62] Here, a confession was obtained when a prison inmate, an ex-cop who was also an FBI informer, offered to protect Fulminante from prison violence, but only if he confessed to the murder of his daughter. In a sharply contested five-to-four opinion, the Court reversed the well-established doctrine that a coerced confession could never constitute "harmless error." Whether the ruling will be as important in *encouraging* police coercion of confessions as the King videotape will be in discouraging future street brutality remains to be seen. But in concert with other recent U.S. Supreme Court decisions that have cut back on the rights of defendants, the *Fulminante* decision may also send a message that police coercion is sometimes acceptable, and that a confession elicited by police deception will almost always be considered "voluntary."

## NOTES

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1 Rothman & Neier, *India's Awful Prisons*, N.Y. REV. BOOKS, May 16, 1991, at 53-56.

2 *Id.* at 54.

3 *See* E. HOPKINS, OUR LAWLESS POLICE: A STUDY OF UNLAWFUL ENFORCEMENT (1931), and E. LAVINE, THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSE OF POLICE BRUTALITY (1930).

4 "Confession at Gunpoint?" 20/20, ABC NEWS, March 29, 1991.

5 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, LAWLESSNESS IN LAW ENFORCEMENT (1931).

6 Richard Leo, From Coercion to Deception: An Empirical Analysis of the Changing Nature of Modern Police Interrogation in America (paper presented at the Annual Meeting of the American Society of Criminology, Nov. 19-23, 1991).

7 See G. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988).

8 *See* Skolnick, *Deception by Police*, CRIMINAL JUSTICE ETHICS, Summer/Fall 1982, at 40-54.

9 Brown v. Mississippi, 297 U.S. 278 (1936).

10 Caplan, *Questioning Miranda*, 38 VANDERBILT LAW REVIEW 1417 (1985).

11 The Supreme Court's very recent ruling that coerced confessions may be "harmless error" will undermine this general rule. Arizona v. Fulminante, U.S. LEXIS 1854 (1991).

12 Chambers v. Florida, 309 U.S. 227 (1940).

13 314 U.S. 219 (1941).

14 322 U.S. 143 (1944).

15 *See* Rochin v. California, 342 U.S. 165 (1952), Spano v. New York, 360 U.S. 315 (1959), and Rogers v. Richmond, 365 U.S. 534 (1961).

16 Miranda v. Arizona, 384 U.S. 436 (1961).

17 Caplan, *supra* note 10, at 1422-23.

18 The state of Alaska requires, as a matter of state constitutional due process, that all custodial interrogations be electronically recorded. *See* Stephan v. State, 711 P.2d 1156 (1985).

19 Wald, et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L. J. 1519-1648 (1967), and N. MILNER, COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971).

20 Orozco v. Texas, 394 U.S. 324 (1969).

21 *See* Beckwith v. United States, 425 U.S. 341 (1976), Oregon v. Mathiason, 429 U.S. 492 (1977), and California v. Beheler, 463 U.S. 1121 (1983).

22 However, police may deceive an attorney who attempts to invoke a suspect's constitutional rights, as to whether the suspect will be interrogated, and the police do not have to inform the suspect that a third party has hired an attorney on his behalf. People v. Moran, 475 U.S. 412 (1986).

23 People v. Honeycutt, 570 P.2d 1050 (1977).

24 See O. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 165-200 (1973) for a useful summary of studies assessing the impact of Miranda in New Haven, Los Angeles, Washington, D.C., Pittsburgh, Denver, and rural Wisconsin. These studies indicate that police obtain waivers from criminal suspects in most cases. Additionally, the Captain of the Criminal Investigation Division of the Oakland Police Department told one of the authors that detectives obtain waivers from criminal suspects in 85-90% of all cases involving interrogations.

25 Colorado v. Spring, 107 S.Ct. 851 (1987).

26 Consider the following passage from R. Royal and S. Schutt, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976): "To be truly proficient at interviewing or interrogation, one must possess the ability to portray a great variety of personality traits. The need to adjust character to harmonize with, or dominate, the many moods and traits of the subject is necessary. The interviewer/interrogator requires greater histrionic skill than the average actor....The interviewer must be able to pretend anger, fear, joy, and numerous other emotions without affecting his judgment or revealing any personal emotion about the subject" (p. 65).

27 People v. Adams 143 Cal.App.3d 970 (1983).

28 F. INBAU, J. REID, & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (1986).

29 People v. Adams, *supra* note 27.

30 Bram v. United States, 168 U.S. 532 (1897).

31 Miller v. Fenton, 796 F.2d 598 (1986).

32 Kaci &Rush, *At What Price Will We Obtain Confessions?* 71 JUDICATURE, 256-57 (1988).

33 Leyra v. Denno, 347 U.S. 556 (1954).

34 Illinois v. Perkins, 110 S.CT. 2394 (1990).

35 In Massiah v. United States, 377 U.S. 201 (1964), the U.S. Supreme Court held that post-indictment questioning of a defendant outside the presence of his lawyer violates the Sixth Amendment.

36 *See* Cohen, *Miranda and Police Deception in Interrogation: A Comment on Illinois v. Perkins*, CRIMINAL LAW BULLETIN 534-46.(1990).

37 *See* Skolnick, *Scientific Theory and Scientific Evidence: Analysis of Lie Detection*, 70 YALE LAW JOURNAL 694-728 (1961); and D. LYKKEN, A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE-DETECTOR (1981).

38 Frazier v. Cupp, 394 U.S. 731 (1969).

39 Ashcraft v. Tennessee, *supra* note 14, at 160.

40 Florida v. Cayward, 552 So. 2d 971 (1989).

41 *Id.* at 977.

42 Caplan, *Miranda Revisited*, 93 YALE L. J. 1375 (1984).

43 F. INBAU, LIE-DETECTION AND CRIMINAL INTERROGATION (1942).

44 Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859-945 (1979).

45 *See* Kassin & Wrightsman, *Confession Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (S. Kassin & L. Wrightsman eds. 1985). G. GUDJONSSON & N. CLARK, SUGGESTIBILITY IN POLICE INTERROGATION: A SOCIAL PSYCHOLOGICAL MODEL (1985); Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 6-15 (1989); Gudjonsson, *The Psychology of False Confessions*, 57 MEDICO-LEGAL J. 93-110 (1989); R. Ofshe & R. Leo, The Social Psychology of Coerced-Internalized False Confessions (paper presented at the Annual Meetings of the American Sociological Association, August 23-27, 1991).

46 Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21-179 (1987).

47 Kassin & Wrightsman, *supra* note 45.

48 *See* J. BARTEL, A DEATH IN CANAAN, (1976); AND D. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977).

49 State of Florida v. Tom Franklin Sawyer, 561 So. 2d 278 (1990). *See also* Weiss, *Untrue Confessions*, MOTHER JONES, Sept.. 1989, at 22-24 and 55-57.

50 Ofshe & Leo, *supra* note 45.

51 Florida v. Cayward, *supra* note 40, at 978.

52 *Id.*

53 *Id.*

54 Inbau, *Police Interrogation—A Practical Necessity*, 52 J.CRIM. L,. CRIMINOLOGY, & POL. SCI. 412 (1961).

55 Florida v. Cayward, *supra* note 40, at 983.

56 Huff, Rattner & Sagarin, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy* , 32 CRIME & DELINQ. 518-44 (1986). *See also* Rattner, *Convicted But Innocent:: Wrongful Conviction and the Criminal Justice System*, 12 L.& HUM. BEHAV. 283-93 (1988).

57 Bedau & Radelet, *supra* note 46.

58 P. JOHNSON, CRIMINAL PROCEDURE 540-50 (1988).

59 *Id.*. at 542.

60 *Id.*.

61 Moran v. Burbine, 475 U.S. 412 (1986).

62 Arizona v. Fulminante, *supra* note 11.